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Supreme Court

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United States

OCTOBER TERM, 1973

No. 73-5667

ALICE LOVE, et al.,

Petitioners,

vs.

DeCARLO HOMES, INC.,

Respondent.

On Petition for Certiorari to United States Court of Appeals, Fifth Circuit

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BRIEF OF RESPONDENT OPPOSING CERTIORARI

PETITION NOT PRINTED

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STATEMENT OF THE CASE

This case arose in the United States District Court for the Southern District of Florida, wherein Petitioners, 13 blacks (including four couples) filed Complaint alleging racial discrimination against Respondent, two of its principal officers, and three institutional lenders.

As the case progressed, all other defendants were dropped, leaving only Respondent, DeCarlo Homes, Inc.

After extensive depositions of the 13 plaintiffs—now Petitioners, and a previous hearing in open Court, at the Petitioners' request for further hearing the case came on for court hearing a second time on Petitioners' Request for Determination of Class, there being pending Respondent's Motion to Dismiss Petitioners' Second Amended Complaint.

After that second extensive hearing the District Court (Hon. Peter T. Fay) dismissed Petitioners' Second Amended Complaint, Petitioners indicating they did not wish to plead further, and entered a Rule 12(b) summary judgment for Respondent.

Petitioners then appealed to the Fifth Circuit Court of Appeals, with some notable omissions: the only appellee was present Respondent, DeCarlo Homes, Inc.; the other defendants were dropped; and on that appeal Petitioners abandoned all bases for claim except 42 U.S.C. 1982, abandoned the attempt to proceed as a class action, and expressly denied reliance on *Trafficante v. Metropolitan Ins. Co.* (1972 ___ U.S. ___, 93 S.Ct. ___, 34 L.Ed.2d 415.

The appeal resulted in an affirmance (482 F.2d 613).

Although Petitioners continually seek to proceed in forma pauperis; that stance is unjustified as all of those parties have substantial equities in the residences in question, although as chronic delinquents they have been subjected to at least seven foreclosure suits, which they countered by prosecuting the present action.

STATEMENT OF THE FACTS

The pertinent facts presented to the District Court were substantially undisputed.

The only deviation from that condition occurs when Petitioners set about to state those facts, in which event serious, and would be-prejudicial, misstatements are made. Such is the case in the present Petition for Certiorari in the following four respects.

(1) that there "was the clear showing by the Petitioners that the Respondent created the housing subdivision in question solely for blacks . . ." (Pet. for Cert., p. 4) There was no such evidence at any time offered or admitted. Respondent, by building for sale, cheap ($10,000) housing naturally would have to look to low-income buyers which, of course, would include blacks.

(2) "that the Respondent . . . took definite steps to avoid any sales to whites." (Pet. for Cert., p. 4) There was no such evidence offered or admitted; the fact was that there were several sales to whites in the subdivision; Petitioners' witness, a black salesman said he was to refer any white prospects to Respondent's other salesmen; but he did not know why; Respondent had other subdivisions in South Dade County priced from somewhat, to considerably higher.

(3) that the Court of Appeals' reference to Petitioners' necessary concession that, factually, their case did not present a *"Trafficante* type claim" "is erroneous." (Pet. for Cert., p. 4) Petitioners had of necessity to concede on oral argument that several of Respondent's homes in Lincoln Estates were sold to whites and occupied by them, thus eliminating *Trafficante* and removing the basis for Petitioners' new version of the claimed issue, namely, that there was shown "the creation of a special housing market for black citizens [only]."

(4) that there was (necessarily) evidence "of the Respondent's act of deliberately creating an all-black market, controlled and operated by the Respondent to the obvious detriment of the Petitioners, at a time when alternative markets were not available to the Petitioners." (Pet. for Cert., p. 5) There was no evidence of this; the 'creation of an all-black market' was disproven by Petitioners' own witness who had to admit several white families bought and occupied Respondent's homes in the subdivision. There was no evidence of the absence of 'alternative markets' at the time, some years before, when this subdivision was started.

The background of this case is that in 1963 Respondent DeCarlo Homes, Inc. started to build and sold about 300 residences in a semi-rural area of south Dade County, Florida. In the general area of this subdivision, there were

other built-up areas, some predominantly occupied by blacks and other low-income people. The development is close to large argicultural, fruit and vegetable packing, and other industrial operations.

In so developing the land, Respondent catered to an obvious market; the houses were low in cost and mostly sold on the basis of Agreements for Deed (legally equivalent to a mortgage, in Florida) with 1% to 3% down payments, low monthly installments, and higher than ordinary (but strictly legal) interest rates. FHA and private institutional financing were available to those who could qualify; and signs informed the would-be buyers of this.

Obviously the people who would be interested in homes selling at the prices asked would be so financially circumstanced that many of them would not be able to qualify for either conventional or FHA financing. Such proved to be the case. Contrary to Petitioners' constantly repeated representations, one of Petitioners' own witnesses admitted he bought one of Respondent's houses with FHA financing and would not deny that others had done so. Respondent's witness, Charles DeCarlo, testified that a number of buyers had done so.

Contrary to Petitioners' constantly repeated assertions that Respondent sold only to blacks, the undisputed testimony was that several of the 300 family units in the project were not blacks.

A notable fact is that, out of the 300 family units involved, only 13 buyers joined in this suit, representing but only nine family units. And among these nine family

units, seven foreclosure suits had been generated, on account of chronic delinquencies.

As the bases for a claim of discrimination, Petitioners *pleaded* such *false* and *unsubstantiated* matters as accusations of:

(1) "unlawful and unconscionable provisions" in the form of Agreement for Deed used (the form approximated the usual form of the protective provisions in a mortgage);

(2) charging excessive amounts for insurance (the Agreement provided the buyer was to obtain insurance at the "highest insurable value", failing which Respondent could obtain the insurance and recapture the premium cost from the buyer);

(3) charging commissions for obtaining insurance (no evidence on this);

(4) causing Petitioners to believe all home insurance had to be obtained through the wholly-owned insurance agency of Respondent (as noted above, the Agreement expressly provided otherwise; and the evidence was that Respondent had no interest in an insurance agency or company);

(5) "imposition of improper unlawful 'late charges'" (the Agreement provided: "A late charge of $5.00 shall be paid by the Buyers on any monthly payments delinquent five (5) days from due date.");

(6) "imposition of unlawful attorney's fees" (under Florida law there is nothing unlawful about the customary contractual provision for court-allowed attorney's fees in collection cases or foreclosure suits);

(7) "setting the purchase prices of the properties at amounts far in excess of the fair value" (there was no word of evidence of this, but some Petitioner-deponents said their property was worth more now than they 'paid' for it);

(8) false representations of compliance with local building codes (the only evidence was contra);

(9) that the interest rate provided for, 7½%, was "illegal" (10% is the legal maximum in Florida);

(10) that monthly payments were "not properly apportioned as between . . . principal and interest" and that payments were credited "solely to interest", contrary to Petitioners' "expressed wishes", (there was no evidence on this; the payment books held by the Petitioner-buyers showed the contrary, except in instances where a payment followed an extended delinquency);

(11) "fraudulently" advising Petitioners the deals would be paid out in "15 to 20" years (instead of 30 years);

(12) when a buyer was in default and so declared by Respondent, "knowingly and fraudulently us[ing] written notices to threaten plaintiffs [Petitioners], in contravention of the Agreements for Deed";

(13) trying (unsuccessfully, of course) to use "eviction" proceedings against defaulting Petitioners (instead of the proper remedy: foreclosure, with its attendant deficiency judgment);

(14) in cases of some defaulters, modifying the terms of the agreements (in other words, a novation occurred) on more favorable terms than originally;

(15) depriving buyers of "fair financing and methods of purchase of residences" (the evidence was contra, i.e., that buyers, if they chose, could, as customary, arrange their own financing (which some did), failing which they could, with a $100 to $300 down payment, move in and proceed to acquire title to the residence under the Agreement for Deed which arrangement was made available by Respondent, DeCarlo Homes, Inc.).

The basic, undisputable fact in this case is that as a developer-builder, owning a substantial plot of property in a generally low-income area, Respondent did cause some 300 Negro family units to obtain residences of their own, the overwhelming percentage of which make their payments and apparently have no complaint, whereas Petitioners, who have acquired homes, disclose themselves to be a little group of chronic delinquents who are being used to prosecute this suit.

REASONS WHY CERTIORARI SHOULD BE DENIED IN THIS CASE

The Impropriety of Petitioners' Question Presented for Review

Petitioners' depart from the facts of the record in three vital respects in their purported statements of the issue in this case, viz.

First, there is the language "creation of a special housing market for black citizens", used as if there were some evidence of such action. In a relatively undesirable area, where high-priced houses would not attract persons with sufficient financial ability, Respondent owned a tract of land. The judgment was to build houses, at about $10,000 sale price, to cater to low-income persons, many of whom were employed in nearby industrial operations, fruit and vegetable packing plants, large farms, and the like. The labor force in the area was predominantly black; they needed housing they could afford. Respondent sold to whites and blacks alike and indiscriminantly. Therefore, Petitioners depart from the facts of the case when they, in their statement of the issue, would have this Court believe that there was some factual basis for the acusation of "creation of a special housing market for black citizens".

Second, there is the language "creating economic disadvantage for the black home buyer". Whatever economic disadvantage there was is not in evidence. Furthermore, whatever economic disadvantages can be theorized, because the same terms were accorded both white and black buyers in the subdivision, there could not have

been any discrimination, racial or otherwise. Thus, this challenged phrase in the statement of the issue is outside the facts of this case.

Third, the injection of the phrase "absent a showing that white citizens were afforded more advantageous terms of purchase" is an attempt to divert attention from the undisputed fact that in Respondent's subdivision white and black alike were offered and bought under identical terms. Thus, there was no 'absence of a showing', as Petitioners imply and would have this Court believe, but a positive showing of equality of treatment in actual practice of black and white alike.

These departures from the undisputed facts of record render Petitioners' statement of the question entirely improper.

There is No Rule 19 Basis for Certiorari

The Rule 19 bases for granting certiorari can be quickly and definitely eliminated from this case.

There is no claim of a conflict of Court of Appeals decisions; none is cited by Petitioners.

There is no important question of federal law which has not been, but should be settled by this Court; here Petitioners made allegations of racial discrimination; the facts adduced either failed to support, or directly contradicted, those allegations; they lost their case; the Court of Appeals affirmed. 42 U.S.C. Sec. 1982 is the sole reliance of Petitioners; it reads, in pertinent part:

> "All citizens of the United States shall have the same right, in every State . . ., as is enjoyed by white citizens thereof to . . ., purchase, . . ., hold, and convey real . . . property."

There is no hint of any fact in this case denying or abridging Petitioners' right to "purchase" and "hold" real property. They each have purchased a residence from Respondent and presently (except those delinquents among Petitioners who have since been foreclosed against) hold possession and upon completion of the agreed purchase price are entitled to fee simple title, under the Agreements for Deed. Moreover, there is the most important fact, that in the same subdivision, whites bought homes from Respondent on the same terms and Agreements for Deed as were accorded to Petitioners. Thus, the facts adduced by Petitioners showed no discrimination, racial or otherwise, in Respondent's sales of the some 300 houses in Lincoln Estates subdivision.

There is no claim that the Court of Appeals here has decided a federal question in conflict with applicable decisions of this Court. The only decision of this Court relied on is *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189, a case under Sec. 1982, but one where the discrimination was evident — refusal to sell a house to a would-be buyer because he was a Negro — and the question decided was whether or not a private party could sue to secure the rights afforded by Sec. 1982. Neither discrimination, nor any denial of the right of Petitioners, as private parties, to sue in this case, appears in the facts or record of this case. In *Jones*, this Court stated that Sec. 1982, relied on here, implements the Thirteenth Amendment guarantee of "the freedom

to buy whatever a white man can buy, the right to live wherever a white man can live."; and the sales to both whites and blacks, under the same form of Agreements for Deed, by Respondent in the subdivision in question, an undisputed fact in this case, utterly belies any denial or abridgement of that "freedom to buy whatever a white man can buy".

After stating to the Court of Appeals at oral argument that this case was not a "*Trafficante* type situation" and that they were not relying on that case, in their petition for certiorari Petitioners seek to change position apparently and try to rely on *Trafficante v. Metropolitan Life Ins. Co.* (1972) ____U.S.____, 93 S.Ct.____, 34 L.Ed.2d 415, a case not under Sec. 1982, but under the Civil Rights Act of 1968, where the issue was, as in *Jones,* supra, whether the individuals, one black and one white tenant in an apartment complex, had the right as private individuals to sue to enjoin an alleged practice and policy of keeping out blacks as tenant, or not having a general racial mix of tenants. This Court held that, as under Sec. 1982, those individuals did have a private right to maintain an action. This Court held and issued the caveat:

> "Individual injury or injury in fact to petitioners . . ., is alleged here. What the proof may be is one thing; . . ."

Petitioners would also rely on the District Court case of *Contract Buyers League v. F. & F. Inv.* (ND Ill. 1969) 300 F. Supp. 210, but this was a case where the issue was sufficiency of a Complaint which alleged 'block-busting', buying with 'scare' tactics from whites, followed by quick turn-around sales "at greatly inflated prices to negro

purchasers", by use of false and excessive appraisals of the used residential property, etc., etc. The District Court stated:

> "In the instant case, the discrimination alleged is the sale of used residential property to negroes at higher prices and on more burdensome terms than similar property is sold to whites."

None of this kind of thing was made to appear in this case at all. There is no conflict with that case either.

Finally, there is no claim by Petitioners of any departure from the accepted and usual course of judicial proceedings, nor any sanction thereof by the Court of Appeals.

> *Assuming Petitioners' Allegations of Discrimination Were Sufficient, Certiorari Should be Denied Here Because the Facts of the Case Disproved Any Discrimination By Respondent.*

As indicated in Respondent's Statement of the Facts hereinabove Petitioners' three forms of Complaint contained several allegations of facts which would amount to racial discrimination, *if true.*

However, in seeking certiorari, Petitioners fail to disclose to this Court that in each and every instance, as regards those crucial allegations there was either a complete absence of proof, or the undisputed facts — almost entirely from Petitioners and their witnesses — absolutely disproved Petitioners' allegations of racial discrimination.

Petitioners neglect to disclose to this Court the numerous depositions of Petitioners and their witnesses, supplemented by two extended hearings where testimony and documents were submitted by Petitioners. In other words, a full inquiry was afforded the District Judge upon which, plus written and oral argument, it was adjudged that Respondent was entitled to a Rule 12(b), F.R.C.P. summary judgment, and so ordered.

Petitioners would simply ignore such caveats from this Court as in *Trafficante:* "what the proof may be is one thing; . . ." and in *Norwood v. Harrison* (1973) ____U.S.____, ____S.Ct.____, 37 L.Ed.2d 723, 735: "No presumptions flow from mere allegations; . . ."

In other words, Petitioners failed in District Court, and affirmance followed, simply because the facts did not support the pertinent allegations, or those allegations were positively disproved by undisputed evidence. The texts of the District Court's judgment and the Court of Appeals opinion demonstrate this condition of the record as to failure of proof.

Under these circumstances, this is not a case for grant of certiorari.

CONCLUSION

It is, therefore, respectfully submitted that there is no basis for a petition of certiorari and that judicial discretion requires denial thereof in this case.

CERTIFICATE OF SERVICE

And it is hereby certified that three copies hereof were mailed to Attorneys for Petitioners: Sally Weintraub, Weintraub, Townsend & Singer, and Robert Bertisch, at 9879 E. Fern Street, Miami, Florida 33157, on November 26 1973.

Respectfully submitted,

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By_____